SERVED: March 24, 1999

NTSB Order No. EA-4750

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATIO N SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of March, 1999

Application of GROVER C. CROCKER for an award of attorney's fees and related expenses under the Equal Access to Justice Act (EAJA).	Docket 249-EAJA-SE-14875

OPINION AND ORDER

The Administrator appeals from the initial decision of Administrative Law Judge William R. Mullins, issued on February 13, 1998, awarding applicant $37,837.47 in attorney's fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"). [1] We grant the appeal.

The Administrator issued an Emergency Order of Revocation of applicant's airline transport pilot ("ATP") certificate and flight instructor certificate on April 11, 1997, alleging that he made intentionally false entries in connection with two

[1] A copy of the initial decision is attached.

applications for an IA-Jet type rating he approved as a designated pilot examiner ("DPE") on August 30, 1996. The Administrator's case was that applicant intentionally overstated the time spent on the oral and flight portions of the practical exam and could not have conducted a legitimate test of both pilots in the time actually available to him. At the hearing, the law judge found for applicant, and we denied the Administrator's appeal in light of "the law judge's credibility-dependent findings." Administrator v. Crocker, NTSB Order No. EA-4565 at 4-7 (1997).

The EAJA requires the government to pay certain attorney's fees and expenses of a prevailing party unless the government establishes that its position was substantially justified. 5 U.S.C. 504(a)(1). To meet this standard, the Administrator must show that her decision to bring and maintain her case was "reasonable in both fact and law, [that is,] the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory." Thomas v. Administrator, NTSB Order No. EA-4345 at 7 (1995) (citations omitted). Reasonableness in this context is determined by whether a reasonable person would be satisfied that the Administrator had substantial justification for proceeding with her case, Pierce v. Underwood, 497 U.S. 552, 565 (1988), and is determined on the basis of the "administrative record, as a whole." Alphin v. National Transp. Safety Bd., 839 F.2d 817 (D.C. Cir. 1988). The

Administrator's failure to prevail on the merits in the original proceeding is not dispositive. U.S. Jet, Inc. v. Administrator, NTSB Order No. EA-3817 (1993); Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986).

Applicant submitted the instant EAJA application on July 24, 1997, and, on February 13, 1998, the law judge granted applicant $37,837.47 in fees and expenses. In his EAJA decision, the law judge concluded that the Administrator was not substantially justified in bringing her case because circumstantial evidence on the issue of intentional falsification "must be so compelling that no other determination is reasonably possible." Initial (EAJA) Decision at 6 (citing Administrator v. Hart, 3 NTSB 24, 26 (1977)).[2] Although he recognized that "when considered in its best light, [the Administrator's evidence] might have indicated a possible invalid test," the law judge apparently found it compelling that there was "no evidence, direct or circumstantial, of intentional falsification, *except the inference the Administrator sought on the possible invalid test*" to support the Administrator's case. Initial (EAJA) Decision at 5-6 (emphasis added). The problem with the law judge's decision is that although he may have discounted those inferences sought by the Administrator, the record indicates that the Administrator was

[2] This standard for the element of intent is misleading in the context of an EAJA appeal. A different finding on the issue of intentional falsification would have been warranted if the law judge had reached a different conclusion from testimony sponsored by the Administrator.

substantially justified in taking those inferences to a hearing.

At the hearing, a crucial issue was the time the aircraft arrived with the pilot-applicants to begin the testing process, for, because there was general agreement as to what time applicant departed the airport on a commercial flight, this logically established the maximum "window" within which applicant could have conducted both the flight and ground portions of the practical test. [3] Similarly, a central issue was the amount of time the aircraft was flown during the flight portion of the test.[4] For example, although applicant and the pilot-applicants claimed that the practical exam began around 9:30 AM, the Administrator presented independent evidence which, if credited, indicated that the flight test aircraft did not arrive with the pilot-applicants until about 11:30 AM. Similarly, applicant and the pilot-applicants claimed that the flight portion of the practical test began at about 1:00 PM, but while applicant and the pilot-applicants testified that the flight ended at 3:30 PM, the Administrator presented evidence which, if credited, tended to establish that the flight terminated closer to 2:45 PM. [5]

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[3] The record indicates that the pilot-applicants were tested simultaneously.

[4] A detailed recitation of the evidence relied upon by the Administrator to support her charges may be found in our opinion on the merits and the law judge's initial decision attached thereto.

[5] We think applicant's claim that he and the pilot-applicants borrowed an FBO courtesy vehicle and drove to a nearby restaurant for a quick meal before he departed on a 4:15 PM commercial flight justifies suspicion of his claim that the flight test

(continued…)

These issues were only resolved after the law judge evaluated the conflicting testimony. Although the law judge ultimately credited applicant's evidence, our precedent makes it clear that the Administrator is substantially justified in proceeding to a hearing "when key factual issues hinge on witness credibility." Caruso v. Administrator , NTSB Order No. EA-4165 at 9 (1994); Martin v. Administrator , NTSB Order No. EA-4280 at 8 (1994). Accordingly, given that there is no question that the Administrator's theory of the case was reasonable in law, we think the Administrator was substantially justified in taking her allegations to a hearing. [6]

ACCORDINGLY, IT IS ORDERED THAT :

1. The Administrator's appeal is granted; and
2. The law judge's grant of an EAJA award is reversed.

(…continued)
aircraft did not land until 3:30 PM. Other claims by applicant cast reasonable doubt upon his version of events; for example, in an apparent concession that the total time spent on the practical examinations was minimal, applicant claimed to have continued the oral portion of the examination during the brief meal after the flight test. In any event, as we have repeatedly stated, the Administrator was not obligated to accept uncritically the exculpatory claims of applicant or the pilot-applicants. See Thompson v. Hinson , NTSB Order No. EA-4345 at 8-9 (1995).

[6] Although we dismissed the Administrator's appeal on the merits largely on account of our well-established policy of deferring to the law judge's credibility determinations, the Administrator's appeal raised good faith arguments. Our belief that the Administrator was substantially justified in pursuing that appeal is based on the then-unresolved issues raised, and not on how we chose to characterize the issues on appeal.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, and BLACK, Members of the Board, concurred in the above opinion and order. Member GOGLIA did not concur and submitted the following dissenting statement.

John J. Goglia, Member, dissenting:

I dissent from the Board's reversal of the Administrative Law Judge's award of fees and expenses of $37,837.47 under the Equal Access to Justice Act. The ALJ concluded that the Administrator was not substantially justified in proceeding to a hearing, and I agree with the Administrative Law Judge.

There is no "substantial justification" for the FAA proceeding in this case. Mr. Crocker is a decorated and retired USAF pilot and a retired FAA employee. His supervising FAA Flight Standards District Office (FSDO) was San Antonio. Mr. Crocker was the Designated Pilot Examiner for Mr. Spisak and Mr. Lawson on their applications for IA-Jet type ratings. Mr. Crocker examined the applicants and approved their applications. He was charged with making false statements on an application and the Complaint against him sought a one year suspension of his Airline Transport Pilot and Flight Instructor Certificate for a period of one year.

This case should never have proceeded to a hearing because there was never any evidence that Mr. Crocker falsified any document as alleged in the complaint. The case against Mr. Crocker was initiated by the Fairbanks FSDO which had an ongoing investigation of the Applicants Spisak and Lawson. The Fairbanks FSDO wrote a letter to the San Antonio FSDO questioning Crocker's examination of Spisak and Lawson. The San Antonio FSDO suspended Crocker's DPE pending investigation, but the investigation was turned over to the Fairbanks FSDO. The issues raised by the Fairbanks FSDO involved the use of a group oral exam and the actual amount of time spent during the flight test.

Respondent Crocker's DPE should never have been suspended once, it should not have been suspended a second time, and this case should not have gone to hearing before an ALJ. The first issue was whether Crocker could give a group oral exam. Group oral exams are permitted by the FAA. The Administrative Law Judge found that Mr.Crocker was in full compliance with the regulations. The second issue involved the amount of time for the flight test.

Qualifications were not an issue in this case. It is not alleged that Mr. Crocker is unqualified to give a test, or that Mr. Spisak or Mr. Lawson are not qualified to pass an exam. The FAA's entire case was based on the inference that the flight test was so short that it might possibly indicate that it was not a valid test. There is no minimum time required for a flight test. The only evidence presented by the FAA was presented by one pilot who had never tested two applicants at the same time. Respondent's unchallenged witnesses all testified that he was very precise, that he completes the check ride in the shortest possible time due to the large operating cost of the aircraft and that he has a reputation for truth and veracity.

Government attorneys have an obligation to treat the public with fairness and due consideration. In order to avoid any hint of over-zealousness, it is prudent to exercise discretion at all stages of the proceedings. This was not done here. The FAA failed to support a critical element of its case by credible evidence. It could reasonably have anticipated the result. Where the FAA appears to be driven more by zeal than by substantive facts the results should be a substantial award under the Equal Access to Justice Act.